



The EU as an 'Intergovernmental' Actor in Foreign Affairs

Case Studies of the International Criminal Court and the Kyoto Protocol

Martijn L.P. Groenleer and Louise G. van Schaik

Abstract

This paper examines the relationship between the institutional set-up of the EU policy-making process and the international actorness of the EU in two cases: the establishment of the International Criminal Court (ICC) and the negotiations in the United Nations Framework Convention on Climate Change (UNFCCC) on the implementation details of the Kyoto Protocol. In both cases, the EU policy-making process is distinctly intergovernmental with a limited role for the supranational EU institutions (the European Parliament and the European Commission) and a large role for EU member states and the Council Presidency. Yet, in both cases, the EU operates with a high degree of international actorness. We argue that this is so not only because member states had similar preferences on the issue of climate change and international criminal justice, and because formal rules, legal competences and decision-making procedures had a mediating effect. The high degree of international actorness in both cases can also be explained by processes of social interaction amongst EU member states and between EU member states and non-EU and non-state actors through which preferences converged.

Keywords: European Union, foreign policy, international actorness, International Criminal Court, Kyoto Protocol.

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THE EU AS AN ‘INTERGOVERNMENTAL’ ACTOR IN FOREIGN AFFAIRS

CASE STUDIES OF THE INTERNATIONAL CRIMINAL COURT AND THE KYOTO PROTOCOL

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1. Introduction

When it comes to foreign policy issues, the European Union is often highly divided.¹ Consider, for example, its inability to end ethnic cleansing in Kosovo in 1999 without the assistance of the United States, and, most recently, the political rift between particularly the larger EU member states on the war in Iraq.

Despite the much publicised discord, the role of the EU as an actor in the international arena has rapidly evolved in recent years. The appointment in 1999 of a High Representative for the Common Foreign and Security Policy (CFSP) has led to increased continuity in EU representation in the world; in 2003, the EU agreed on the deployment of troops in Macedonia for its first-ever military mission; and, in recent years, the EU has progressively developed the European Neighbourhood Policy. Moreover, the scope of the external Community policies, such as trade and environment, has broadened considerably over the last decades. Today, even Justice and Home Affairs policies have an external dimension, particularly where it concerns issues such as asylum, immigration, organised crime and terrorism.

The past decade has seen many studies on EU foreign policy and the role of the EU as an actor in the world (e.g. Allen, 1998; Hill, 1993; 1998; Bretherton & Vogler, 1999; Nutall, 2000; Ginsberg, 2001; Smith, 2003; Peterson & Smith, 2003). Scholars generally point out that in some policy fields the international ‘actorness’ of the EU is hardly developed, whereas in other areas the EU behaves as an actor in its own right. It is often implicitly assumed that the degree of international actorness of the EU is related to the institutional set-up of the policy-making process: the more supranational the EU policy-making process, the higher the degree of international actorness; the more intergovernmental the EU policy-making process, the lower the degree of international actorness.

This article examines the relationship between the institutional set-up of the EU policy-making process and the international actorness of the EU in two particular cases that appear to contradict the conventional wisdom: the establishment of the International Criminal Court (ICC) and the negotiations in the United Nations Framework Convention on Climate Change (UNFCCC) on the implementation details of the Kyoto Protocol. Both cases are often cited as examples in which the EU effectively manages to speak with a single voice.

Yet, policy-making in both cases is set up in a rather intergovernmental way: the ICC case belongs to the CFSP, where policy is primarily made by the member states in the Council of

¹ EU foreign policy here includes the CFSP and all other external policies of the EU, i.e. the external dimension of Community policies and the Justice and Home Affairs policies. In this article, we only discuss the CFSP and the external dimension of Community policies.

Ministers; climate change belongs to the Community pillar, but is a field in which the European Community has to share competence with the EU member states. This makes policy-making more intergovernmental than in cases where the Community has full competence (such as negotiations in the WTO).

We assess the international actorness of the EU in both cases by using four dimensions originally distinguished by Jupille & Carporaso (1998): cohesion, authority, autonomy and recognition. To make this conceptual framework more explanatory, we adopt an institutional perspective, distinguishing between formal legal competences and decision-making procedures (i.e. adopting a rational choice approach), and the development of informal practices and routines on the basis of shared social norms and values (i.e. adopting a sociological approach).

We proceed as follows. In section 2 we elaborate on the intergovernmental character of EU policy-making and our cases in particular. Section 3 sets out the analytical framework by formulating propositions that provide potential explanations for a degree of international actorness. In sections 4 and 5, we present our studies. Our findings are based on the analysis of (official) documents and a number of interviews held between September 2002 and April 2004 with officials of the European Commission and the Council Secretariat, as well as with representatives of EU member states and non-governmental organisations (NGOs) and business groups. The data collected on the ICC also originate from participatory observation.² In section 6, our findings are analysed with regard to the propositions formulated in section 3. The article concludes with a short summary of our findings setting out a framework for the analysis of EU international actorness, suggesting some directions for further research and highlighting the relevance of our findings in light of the more general debate on institutional reform in the area of European foreign policy-making (section 7).

2. The intergovernmental character of EU foreign policy-making

In general, EU policy-making is characterised by both intergovernmental and supranational features (cf. Wallace & Wallace, 2000; Nugent, 1999). Typical intergovernmental features are decision-making by consensus and limited involvement of the European Commission and the European Parliament; typical supranational features are majority voting, a large role for the European Commission and the European Parliament, and the precedence of EU law over national law (Nugent, 1999: 503-505).

Common Foreign and Security Policy (CFSP)

EU *foreign* policy-making is generally organised along intergovernmental lines, with states being the prime actors. This is especially the case with the CFSP, which includes EU policy-making on the establishment of the ICC (Smith, 2003; Peterson & Smith, 2003). Strategic objectives for foreign policy are usually set out by the European Council (the Heads of States and Governments).³ Decisions are taken by the Council of Ministers. Consensus is required for most decisions. In the policy-making process, the Political and Security Committee (PSC), in which the permanent representatives of EU member states participate, plays a crucial role (Smith, 2003). As with most other policies, the Committee of Permanent Representatives (COREPER) acts as a clearinghouse for the PSC on the one hand and the Council of Ministers on the other hand.

² The first author was able to observe the EU policy-making process from within, as a member of the Netherlands Ministry of Foreign Affairs' ICC Task Force.

³ See Articles 13.1 and 13.2 of the TEU.

In the CFSP, the Council Presidency plays a particularly important role, since it not only chairs all Council bodies and decides upon the EU agenda, but it usually also prepares draft versions of official documents and initiates joint actions. The Council Secretariat provides administrative support to the Presidency. Its Secretary-General is also the High Representative for the CFSP in which function he assists the Council in the external representation of the EU (Smith, 2003). The allocated resources for the CFSP and the High Representative are limited when compared to the general EU budget for 'external actions'.

The supranational EU institutions have only limited competences under the CFSP. Formally, the European Commission can also initiate actions, but in practice this hardly occurs; together with the incumbent and incoming EU Presidencies, it is part of the so-called 'troika', representing the EU abroad. The European Parliament (EP) only has an advisory role. It is informed of activities, but the Council is not obliged to follow its recommendations. The CFSP also falls outside the jurisdiction of the European Court of Justice.

External Community Policy

With regard to external Community policies, the character of the policy-making process reflects the internal competence of the European Community.⁴ In areas with exclusive Community competence (e.g. trade), the policy-making process has some supranational features, particularly with regard to the role of the European Commission, whereas in areas of shared and complementary competence intergovernmental characteristics dominate (Dutzler, 2002; Lavranos, 2002).

The Environment chapter of the EC Treaty, including climate change, is an issue of shared competence. This means that a common EU position has both an EC and an EU member state component (cf. Van Schaik & Egenhofer, 2005). Decision-making on this common position is therefore by consensus. For most policy areas of shared competence, it has been agreed that the Presidency will speak on behalf of the EC and the EU member states. The Presidency works closely together with the European Commission and the incoming Presidency in the troika that represents the EU in the most important (informal) negotiations.

Decisions on the common EU positions are taken in the Council of Ministers and prepared by its subordinate Council Working Parties and COREPER. Sometimes the European Council discusses overarching strategic issues. These discussions usually lead to political statements. The EP only has to be consulted regarding EU positions for international environmental negotiations. For internal EU legislation in the field of the environment, however, the EP has a co-decision power. Here also the Commission has a more profound role, since it has the right to initiate legislative proposals (and hence the power to do nothing, to delay action or to withdraw a proposal during the legislative process). Since international positions are usually closely linked to domestic EU legislation (proposed or in effect), international positions can sometimes be indirectly influenced by the EP and/or the Commission.

3. Towards a theoretical framework for explaining EU international actorness

We broadly define EU international actorness as the EU's ability to function actively and deliberately in relation to other actors in the international system (Smith, 2003: 24; cf. Sjöstedt, 1977). To assess the degree of international actorness, we use four dimensions of EU actor

⁴ According to the ERTA judgement, the Community has a competence to act externally in area where it has legislated internally (Peterson & Smith, 2003; Griller & Weidel, 2001; Leal-Arcas, 2001).

capacity: cohesion, authority, autonomy and recognition (Jupille & Caporaso, 1998). Briefly, cohesion refers to similarity or compatibility on the basic goals. Autonomy implies both institutional distinctiveness and independence from state actors. Authority pertains to the legal competence to act. Recognition, finally, refers to “acceptance of and interaction with the entity by others” (Jupille & Caporaso, 1998: 214).

These four dimensions of international actorness are interrelated; the EU, for instance, cannot be considered to have a high degree of international actorness if it is autonomous but not recognised by other actors; nor if it has authority delegated in a certain area but, for example, no common position to act upon. The dimensions allow us to assess the EU’s international actorness, i.e. on the basis of criteria derived from these dimensions we can measure the relative degree of EU international actorness, but they do not enable us to explain *why* we find a high or low degree of cohesion, authority, autonomy or recognition in a particular case of EU foreign policy-making.

In order to explain EU international actorness, we adopt an institutional perspective. We assume that institutions, in one way or another, have an effect on EU foreign policy-making and that they influence the EU’s capacity to act in the international arena. We distinguish between rational choice and sociological institutionalist approaches (cf. Hall & Taylor, 1996; Aspinwall & Schneider, 2000).

A rational choice institutionalist perspective

Rational choice institutionalists see institutions foremost as the formal rules, legal competences and decision-making procedures structuring the policy-making process. Institutions, in this perspective, constrain and regularise the EU’s ability to function as an international actor (cf. Garrett & Weingast, 1993; Tsebelis & Garrett, 2001). Action guided by these formal rules and procedures is outcome-oriented; behaviour is directed towards the ‘consequences’ it is intended to have (March & Olsen, 1989; 1998). Institutions mediate between states’ interests and policy outcomes. Rational choice scholars consider preferences as given, i.e. exogenous to actors, and explain outcomes on the basis of the mediating effect of institutions. This leads us to the following proposition with regard to international actorness:

Proposition 1. The degree of EU international actorness is a function of the extent to which preferences coincide and/or institutions have a mediating effect.

Argued along this line, a high degree of international actorness would result from the fact that the preferences of EU supranational institutions and member states with regard to foreign policy coincide and/or that, whenever there is no initial coincidence of preferences, formal rules, legal competences and decision-making procedures enable the EU to function as an international actor. The following paragraphs outline more specifically the implications for the four different dimensions of EU international actorness.

A high level of cohesion would merely result from similarity in member states’ preferences, because they already share similar basic goals, or at least there is no incompatibility of goals. Even though member states might not agree on the specifics of policies, they would agree on common positions, strategies and actions as long as these serve their objectives. The objective of operating with a common EU position might in itself be preferred by EU member states. Not reaching a common position could, for instance, damage the image of the EU or diminish the power of small EU member states on the international scene. If compared to unanimous decision-making in which every EU member state can cast a veto, qualified majority voting could enhance reaching a common position, since a diverging minority position could be outvoted.

The formal authority that Jupille and Caporaso refer to clearly matches the rational choice focus on formal-legal competences, i.e. that authority is delegated to the EC with the Commission as its main representative. The EU may however also be represented by the Council Presidency, the High Representative for the CFSP or individual member states.

From a rational-choice point of view, a high level of autonomy would be manifested in considerable discretionary powers for the supranational institutions, i.e. the Commission and the European Parliament. Yet, also the Council, although it is not completely separate from the member states, is an autonomous EU institution. In the CFSP, the Council shall ensure the unity, consistency and effectiveness of action by the Union.⁵ The EU member states "shall coordinate their action in international organisations and at international conferences" and they "shall uphold common positions in such fora."⁶ In accordance with the EC Treaty, EU member states "shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."⁷ These formal Treaty provisions could have a mediating effect on the Council's degree of autonomy, since they urge EU member states to cooperate in the Council and to adopt common positions in the light of the goals of the EU Treaties.⁸

A high degree of formal recognition would become apparent when non-EU states and non-state actors can only negotiate with a single actor representing the EU and not individual EU member states. Also EU/EC membership of an international organisation or agreement can be regarded as formal recognition.

A sociological institutionalist perspective

Instead, sociological institutionalism focuses on institutions and the social environments in which they are embedded. Actors' choices are structured by values and norms prevailing in society (March & Olsen, 1989; 1998); wider belief systems and cultural frames guide actors' behaviour (DiMaggio & Powell, 1991). They undergo socialisation, leading to the internalisation of prevalent values and norms (Checkel, 1999; cf. Christiansen et al., 1999; cf. Johnston, 2001).⁹ Actors develop shared knowledge and belief systems that structure their action. Institutions, in this perspective, constitute the EU's ability to behave in a supranational way (Kerremans, 1996), or as an international actor. Action guided by these normative systems and cognitive frameworks is often not outcome but process-oriented; behaviour is 'appropriate' in a specific environmental context instead of instrumental to attain a given end (March & Olsen, 1989: 25-7; 1998). The sociological institutional perspective does not explain outcomes given particular institutions that constrain and regularise behaviour of actors and their interests, but rather explains the process by which actors construct these institutions (Ruggie, 1998; cf. Kratochwil, 1989). This leads us to a second, additional proposition:

Proposition 2. The degree of EU international actorness is a function of the extent to which preferences converge through social interaction processes.

Taking this line of argument, a high degree of EU international actorness would result from the fact that preferences, instead of being fixed, can converge over time through social interaction

⁵ See Article 13 of the TEU.

⁶ See Article 19 of the TEU.

⁷ See Article 10 of the TEC.

⁸ However since the CFSP falls outside the jurisdiction of the European Court of Justice, member states could decide to ignore these calls for a united approach in international affairs (Govaere et al, 2004).

⁹ Previous research has demonstrated that socialisation processes have been apparent in COREPER (Lewis, 1998), the Council (Hayes-Renshaw and Wallace, 1995) and the Commission (Hooghe, 1999).

processes, such as learning and socialisation. The effect of social values and norms on the behaviour of member states and the development of informal practices and routines in a particular field of EU foreign policy-making would explain the degree of EU international actorness.

If we consider the four dimensions of international actorness from a sociological institutional point of view, a high level of cohesion would be the result of the emergence over time of a set of shared norms and values in regard of the objectives and the means by which to realise these objectives. Cohesion would be more normative and cultural, rather than formal and strategic.

Authority is informal when it is not based on formal rules or legal competences but when it relies on the normative acceptance of the EU as an actor (Manners, 2002). It occurs when the EU speaks with a single voice, even though formally EU member states could have decided to put forward their own position. Member states may decide not to do so, however, when they believe it is more appropriate (not necessarily more in their interest) not to do so.

Autonomy in decision-making at the EU level is informal if the participants in the Council of Ministers and notably member states' representatives in the Council working groups consider themselves not just national representatives, but 'European actors' (Kerremans, 1996), and if they act upon commonly accepted 'European values and norms'. This does not happen overnight, but would involve processes of social learning and socialisation between ministers and member states' representatives.

A high level of recognition, finally, would stem from intensive interaction with other actors: EU actors are thus influenced by the contact they have with other non-EU actors and vice versa.¹⁰ Non-EU actors could recognise the EU by approaching actors that represent the EU, such as the High Representative for the CFSP, the Council Presidency or the European Commission instead of individual member states.¹¹

Table 1 below summarises our framework for analysing EU international actorness.

Table 1. EU international actorness: A framework for analysis

	Rational-choice institutionalism	Sociological institutionalism
Cohesion	Officially agreed upon common positions, strategies, and actions resulting from similar or compatible objectives.	Shared norms and values leading to both procedural and substantive agreement.
Authority	Legal authority delegated to EC, as stipulated in formal provisions.	Authority based on acceptance by EU member states that their position is represented by single EU actor.
Autonomy	Institutional distinctiveness and independence from state actors regarding goal formation and decision-making.	Main decision-makers consider themselves European actors, acting upon commonly accepted goals.
Recognition	Formal recognition of the EU as a negotiator, EU is Party to an international agreement and/or member of an organisation.	Interaction by third states and non-state actors with EU instead of individual member states.

¹⁰ However, a high level of interaction does not necessarily have to have a converging effect; it may also have a diverging effect.

¹¹ The Commission, for instance, is often considered to have more information, to be better prepared, and to possess more expert knowledge than some member states.

4. Courting consensus: The EU and the International Criminal Court

On 17 July 1998, during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, 120 countries decided to establish an International Criminal Court (ICC). On 1 July 2002, much faster than anyone could have foreseen, the Rome Statute of the ICC entered into force. Ever since, the ICC can prosecute individuals for the most serious offences of global concern, such as genocide, war crimes and crimes against humanity.

Cohesion

EU member states are generally committed to promoting international criminal justice.¹² The ICC is one of the few issues of the CFSP on which EU member states most often agree, which is not surprising given that members states' domestic human right situation is not likely to result in a situation being referred to the Court (cf. Moravcsik, 1995). All but one of the member states were part of the like-minded group of states that actively lobbied for the creation of an ICC.¹³ Yet, no common position was formulated before the negotiations in Rome. Controversial issues, such as the independence of the Prosecutor, the role of the UN Security Council and the Court's jurisdiction over internal armed conflicts, split the EU. Particularly, the position of the UK and France differed from the other member states (Bassiouni, 1998; Lee, 1999).¹⁴ These two countries feared investigation and/or prosecution of their political and military leaders. During the Rome Conference, the UK and France effectively negotiated the possibility of deferral of investigation or prosecution by the UN Security Council, and opt-out clauses with respect to investigation or prosecution of certain categories of crimes.

But, EU member states eventually all voted in favour of the Statute of the ICC (Bassiouni, 1998; Lee, 1999). Within four years the required number of 60 countries, again including all 15 EU member states, ratified the Statute in order for it to enter into force in 2002. All 10 new EU member states, with the notable exception of the Czech Republic,¹⁵ have now also ratified the Statute. Therefore EU member states form one of the largest groups of States Parties from one region and account for the majority of the financial contributions to the ICC. Hence, the ICC has sometimes been dubbed an 'EU Court'.

¹² CFSP objectives include the strengthening of international security and the development and consolidation of the respect for human rights (Art. 11, TEU).

¹³ France only joined during the last week of the Rome Conference when it had effectively negotiated a proposal allowing states the possibility of blocking prosecution of their nationals for a period of seven years after the entry into force of the Statute (see Article 124 of the Rome Statute).

¹⁴ The UK delegation to the Rome Conference was internally divided. Representatives of the UK Ministry of Defence preferred a Court subordinated to the UN Security Council; representatives of the Foreign Office favoured a Court independent from the Security Council. This information was leaked to the press. Under public pressure, UK Minister for Foreign Affairs, Robin Cook, interfered. The UK supported an independent Court, while it also advocated a proposal allowing the UN Security Council to refer a situation to the Court (see Article 12 (b) of the Rome Statute) or, therewith accommodating the US, to defer an investigation or prosecution (see Article 16 of the Rome Statute) (interview with NGO representative).

¹⁵ In 2001, the Chamber of Deputies of the Czech Parliament rejected a bill for ratification of the Statute, because of its precarious relationship to the Constitution of the Czech Republic. The Government has expressed its commitment to submit a request for ratification as soon as the Parliament passes a constitutional amendment. This, however, is not very likely to happen in the near future, as a number of parliamentarians are still opposed to ratification.

EU commitment to the ICC is demonstrated by the unanimous adoption of a CFSP Common Position to support the effective functioning of the ICC, to advance universal acceptance of the Court and to preserve the integrity of the Statute, as well as by the formulation of an Action Plan that outlines strategies and actions to be undertaken by the EU and its member states to implement the Common Position. In accordance with the Common Position and the Action Plan, the EU and its member states have furthered the issue of the ICC through diplomatic demarches and statements in multilateral forums such as the United Nations, and in negotiations or political dialogue with third states, that have not yet ratified the Statute such as Russia, China and Japan. The Action Plan also makes it possible to deploy EU legal experts to third states that lack the capacity to prosecute the crimes under the Statute.

Whereas the UK and France could have their own policy positions before and during the 1998 Rome Conference, this has become less accepted by other member states today. As the group of representatives from EU member states dealing with ICC matters remained largely the same also after the Rome conference, representatives developed a close identification with the issue of the ICC. They continued to work together in the framework of the meetings of the preparatory commission for the ICC and later also in the Council framework (see below). Moreover, they had frequent informal contacts, for instance in the margins of the many conferences, workshops and seminars (organised mostly by NGOs) on the establishment of the ICC. As a result, national representatives developed a common understanding on the issues involved in the establishment of the ICC. This development was reinforced by the novel and pioneering character of the work. Most of the representatives had never dealt with a similar issue before, simply because the ICC was the first ever permanent international criminal court to be created.

It was the US that put EU unity to the test. After ‘unsigned’ the Rome Statute in May 2002, US Secretary of State Colin Powell sent EU foreign ministers a letter asking them to conclude bilateral agreements to exclude US nationals from the ICC’s jurisdiction. In response, in September 2002, EU foreign ministers, although disagreeing on the legality of the proposed bilateral agreements, unanimously adopted a set of guiding principles that would restrict the scope for concluding bilateral agreements with the US. While they are free to do so, none of the member states has negotiated an agreement so far.¹⁶ And what is more, the EU condemned the US freezing military and economic support to countries Party to the ICC and not willing to enter into the proposed bilateral agreements with the US.¹⁷ The EU also reacted against a US-initiated Security Council resolution granting immunity to UN peacekeepers from ICC jurisdiction. In June 2004, the US finally withdrew a draft resolution that would extend such immunity because several Security Council members, including EU member states France and Germany, had signalled that they would abstain on the vote. Another difference of opinion followed after a resolution tabled by France in March 2005 that would refer the situation in Darfur to the ICC. The US, against a UN Security referral to the permanent Court, instead proposed to create a tribunal for Sudan along the lines of the ad hoc tribunals for the former Yugoslavia and

¹⁶ Before the EU could take its stand on the bilateral agreements, applicant country Romania entered into agreement with the US. At the time of writing, ratification of the agreement is still pending. Moreover, the extradition treaty between the UK and the US that was agreed upon in 2004 has been said to grant immunity to US service members by prohibiting the handing over of US service members to the ICC when extradited to the UK.

¹⁷ See, for instance, the declaration by the Dutch Presidency on behalf of the European Union on the Nethercutt amendment, in which terms such as “deeply regrets” and “urges” are used to condone an amendment adopted by the US Senate. Council of the European Union, Declaration by the Presidency on behalf of the European Union on the Nethercutt Amendment, Brussels, 15864/1/04 REV 1 (Presse 353), 10 December 2004.

Rwanda. The US eventually gave in after it was guaranteed that Americans would be exempted from the Court's jurisdiction.¹⁸

Authority

In accordance with the Treaty of European Union, EU policy-making on the ICC is primarily coordinated in the Council of Ministers with a key role for the Presidency in setting the agenda and preparing draft EU positions. The Presidency also represents the EU externally; only seldom do individual member states for instance make separate statements in multilateral forums such as the UN.¹⁹

Although the European Commission, according to the EU Treaty, is fully associated with CFSP activities,²⁰ this does not entail the delegation of formal authority by the Council. The actual influence of the Commission in the ICC case therefore largely depends on how it manages to stretch its legal mandate. To that effect, the Commission, within the framework of the European Initiative for Democracy and Human Rights (EIDHR), funds NGO initiatives that support the universal acceptance of the ICC.²¹ Moreover, the Commission exerts influence through the mainstreaming of ICC issues into external issues falling under the Community competence, such as its initiative to include a reference to the ICC in the preamble and the main text of the Cotonou Agreement.²²

The European Parliament (EP) is almost absent in the EU policy-making process on the ICC. The Council Presidency and the Commission are supposed to keep the EP updated and to take into account the views of the EP. In practice, the contacts between the Presidency and the Commission on the one hand and the EP on the other hand are rather limited. That being said, the EP has always been a staunch supporter of budget allocations for the ICC (and supports increasing them year after year). Moreover, within the EP a group of like-minded MEPs consistently draws attention to the ICC issue resulting in a number of activist resolutions on the ICC and several parliamentary questions being submitted to the Council and the Commission.

Autonomy

International law issues are mainly dealt with by the Council's Public International Law Working Group, the so-called *Comité Juridique* (COJUR), which is subordinated to the Political and Security Committee (PSC). Until recently, ICC issues were also dealt with by COJUR. In May 2002, however, a special sub area of COJUR devoted to the ICC was created, because the issue of the ICC took too much of COJUR's time and required specific expertise. The ICC sub area consists of senior representatives from foreign ministries (or ministries of justice) and meets on a frequent basis to coordinate on matters relating to the ICC.

¹⁸ *EU Observer*, 'France puts US under pressure to accept war crimes court', 24 March 2005; *New York Times*, 'U.N. votes to send any Sudan war crimes suspects to world court', 1 April 2005.

¹⁹ During the open session of the UN Security Council, discussing the possible renewal of the resolution granting immunity to UN peacekeepers from ICC jurisdiction, the Netherlands, for instance, made a separate statement. The Netherlands did so "as host nation to the ICC" and while "fully [concurring] with the statement made by the Greek Presidency". See Statement by H.E. Mr. Dirk Jan van den Berg, Permanent Representative of the Kingdom of the Netherlands on the Proposed Renewal of the Provisions of Security Council Resolution 1422(2002), New York, 12 June 2003.

²⁰ See article 18.4 of the TEU.

²¹ This funding is not merely technical, for it implies political support for the ratification and implementation of the Statute in third countries.

²² Interview with Commission official.

Formally, the mandate of the sub-area is limited. It has no powers delegated from COJUR; it merely advises COJUR. Furthermore, when it comes to politically sensitive issues, the PSC determines the EU position. This is, of course, not to say that representatives in the sub area do not try to broaden legal issues to also include political matters, such as the proposed bilateral agreements with the US. This is strengthened by the fact that not all representatives are legal experts, but some are policy advisers. Moreover, the recommendations the sub area makes to COJUR are usually adopted by COJUR and endorsed by the PSC without much discussion.

In February 2004, EU member states also established a Focal Point for ICC issues in the Council Secretariat. In practice, this meant designating the official that was already dealing with ICC issues as the Focal Point. Among other tasks, the Focal Point prepares a list of target countries according to whether they have ratified or implemented the Statute, coordinates demarches carried out with these countries, and assists in drafting policy documents such as the Common Position and Action Plan.

Recognition

Although the Commission does not negotiate on behalf of the member states when it comes to ICC issues, nor is it a State Party to the Rome Statute, the recognition of the EU as an international actor has implicitly been demonstrated by the interaction between the EU and both non-state actors and third states, in particular the US. Also, under the Dutch Council Presidency in 2004, the negotiation of a cooperation agreement between the EU and the ICC has been started.²³

Initially, the US tried to conclude bilateral agreements with individual member states that supported US foreign policy objectives, such as the UK, Spain and Italy. Considering that the US approach until now has not been very successful, the then US Under-Secretary of State John Bolton (currently US Ambassador to the UN) suggested concluding an EU-US bilateral non-surrender agreement.²⁴ Also, a US demarche carried out with the Council Secretariat complaining about the EU's diplomatic efforts to prevent third countries from concluding a bilateral agreement with the US may testify for the fact that the US seems to regard the EU not merely as a collection of loosely connected individual states to deal with on ICC matters.

Other countries often look at EU member states for guidance on the ICC. Notably, the EU Council Conclusions on bilateral agreements and the guiding principles annexed thereto seem to be considered an important policy direction by many third countries, in particular developing countries. Although the EU Council Conclusions and guiding principles were originally intended for internal policy coordination, their use in external relations has become common practice. Moreover, that the EU still has been able to keep ranks on the ICC is at least partly due to the interaction with NGOs, notably the Coalition for an International Criminal Court (CICC). NGOs have played an important role in the creation and promotion of an 'effective, fair and independent ICC'. The EU has acknowledged this role by inviting NGOs to share their views with member states in the margins of the ICC sub-area meetings.

²³ Interview with government official.

²⁴ Interview with Council Secretariat official.

5. The EU in international climate negotiations: Keen on its green credentials

The Kyoto Protocol, signed in 1997 within the context of the United Nations Framework Convention on Climate Change (UNFCCC),²⁵ is the most important international agreement on climate change, which contains greenhouse gas (GHG) reduction commitments for industrialised countries. From 1998 onwards, negotiations in the UNFCCC centred on the implementation details of the Protocol, which led to a rejection of the Treaty by the US in 2001,²⁶ the successful negotiations of the Marrakech Accords in the same year, and ultimately to a positive ratification decision by 141 other states – resulting in the entry into force of the Treaty in February 2005.

Cohesion

The ultimate aim of the EU in the climate negotiations is to establish a multilateral climate agreement with binding commitments. This is in line with the EU's overall commitment to multilateralism²⁷ and sustainable development.²⁸ In a so-called 'Burden Sharing Agreement', the EU member states have broken down their common Kyoto target of reducing GHG emissions by 8% by 2010-2012 from 1990 levels. Under this agreement, some member states have a higher reduction target than others. This reflects foremost the higher greenhouse gas reduction potential in some member states and the projected economic growth²⁹, but also to some extent their willingness to reduce greenhouse gases.

A strategic aspect of climate change policy is the relationship between security of energy supply and reducing greenhouse gases from fossil fuel combustion. The EU is an energy importer. One can argue that it is in its interest to reduce its dependency on oil and gas from for instance the Middle East and Russia. However, dependency on fossil fuel imports from countries such as Norway is less problematic, and it is still relatively expensive and/or politically less acceptable to turn to alternative non-fossil fuel energy sources (e.g. renewables or nuclear).

Although not all EU member states were firmly on track with regard to their target, the EU did pledge in a statement in 2001 to reach its Kyoto target unilaterally if necessary.³⁰ The EU member states, responsible for less than 15% of global greenhouse gas emissions, from a rational perspective, would have little incentive to reduce greenhouse gases unilaterally, since greenhouse gases are a common pool resource characterised by the collective action problem (Carraro & Siniscalco, 1998). An EU-only reduction strategy could moreover result in a competitive disadvantage for the EU's energy-intensive industry that would become subject to greenhouse gas reduction policies with accompanying costs, but to a certain extent operates at a global scale.

²⁵ The UNFCCC is one of the conventions of the 1992 Earth Summit of Rio de Janeiro.

²⁶ In 2001 the US rejected the Kyoto Protocol because of its non-universal coverage and its negative effects to the US economy; Letter from President Bush to three US Senators, March 6, 2001, <http://www.whitehouse.gov/news/releases/2001/03/20010314.html>.

²⁷ European Council, Presidency Conclusions, December 2003; Commission Communication COM (2003) 526 final.

²⁸ European Council, Presidency Conclusions, June 2001; Commission Communications: COM (2001) 264 final, COM (2002) 82 final, COM (2003) 829 final.

²⁹ Higher economic growth usually implies an increase of greenhouse gas emissions.

³⁰ European Council, Presidency Conclusions, June 2001.

The 2001 statement, made by the European Council, was a direct reaction to a decision by the US administration to withdraw from the Kyoto Protocol. The EU made a clear political choice for a progressive climate change policy by binding itself to the treaty. In the preparation of the statement initially only Italy had some reservations, but in the end also this country changed its tune in favour of the common statement.³¹

Once the EU had decided to tie its political faith to the Kyoto Protocol, it clearly became in its interest to convince other Parties to follow; both to ensure environmental effectiveness and to minimise competitiveness losses caused by greenhouse gas reduction policies. Therefore it is not surprising that the EU operated as a united block in its diplomatic efforts to convince particularly Canada, Japan and Russia, but also the developing countries to go ahead with Kyoto, despite US opposition.³² The EU succeeded in doing so, although concessions made, for instance on how to count the greenhouse gas emissions of individual countries, did diminish the environmental effectiveness of the Kyoto Protocol (Den Elzen & de Moor, 2001).

Authority

Climate change, as part of the environment chapter of the EC Treaty, is a shared competence between the EU member states and the European Community (cf. Van Schaik & Egenhofer, 2005). Accordingly, article 174 of Environment chapter of the EC Treaty explicitly gives the EU member states the competence to negotiate themselves in international bodies.³³ In the field of climate change, the EU Council of Ministers has decided to use this competence, i.e. not to authorise the Commission to conduct the negotiations. Its lead negotiator is the Presidency, which is assisted by the Commission and the incoming Presidency in the so-called troika.³⁴ The troika operates with a relatively strict mandate from the Environment Council of Ministers, which decides on the basis of consensus, given the member states' competence to negotiate on their own behalf. In the Council of Ministers it is usually the Presidency that prepares the agenda and draft Council conclusions on the EU position. The European Parliament has a limited influence. Officially it has to be consulted, but the Council is not obliged to follow its recommendations.

Although the policy-making process is dominated by the EU member states, this does not mean that the 'EU' does not have the authority to negotiate. It is clear that the Presidency has the delegated authority to represent the EU. A side effect of the Presidency being in the lead is that all EU member states are in this position on a rotating basis, which has forged the identification with the (historical background of the) common position and with the issue of climate change in general.

The position of the Presidency was to a certain extent challenged at the political level at a crucial climate summit in The Hague in December 2000, when various countries, in particular the UK, tried to craft a deal with the US at the eleventh hour (cf. Grubb & Yamin, 2001; Ott, 2001; Lacasta et al., 2002). This attempt failed, which led to polemics between the UK and the French Presidency on the reasons for failure of the meeting. However, the problems were settled

³¹ Agence Europe, *Bulletin Quotidien Europe*, 6 June 2001, p. 9.

³² For instance in 2001, the EU undertook a diplomatic 'tour du monde'.

³³ Article 174 paragraph 4 (TEC) refers to Article 300 (TEC), which states that with regard to Community policies it is the Commission that will be authorised by the Council to negotiate international agreements with third countries. However the last sentence of Article 174, para. 4 reads as follows: "*The previous subparagraph shall be without prejudice to member states' competence to negotiate in international bodies and to conclude international agreements.*"

³⁴ Legally speaking, the troika only exists in the Common Foreign and Security Policy of the EU.

quickly, and at an Environmental Council two weeks later, EU Ministers were united in their analysis of the situation and on the way forward.

Autonomy

The EU is not negotiating independently of its member states. Instead the member states, in their collective capacity and with assistance of the European Commission, are negotiating as a single actor on the basis of their common position. The EU member states form their common position in the Council of Ministers through a lengthy and intensive policy-making process.

In the Council there is an important role for the Council Working Group on climate change that prepares most of the work for the Council of Ministers.³⁵ It is composed of national officials and representatives of the European Commission and meets once or twice a month in Brussels. During the official UNFCCC negotiations,³⁶ the working group – with the exception of the few days that the Ministers themselves are present – has the delegated authority to decide in daily coordination meetings how to adjust the EU position to reach agreement with other negotiating parties. The lead negotiator of the member state holding the Presidency and the other troika participants thereby become key figures co-ordinating and representing the EU in the climate negotiations.

The decision-making process on the EU's position for the international climate change negotiations takes place rather autonomously from non-environmental interests in the EU. In the Environment Council of Ministers the EU position can be decided upon relatively autonomously from economic, general foreign affairs, development aid and energy interests (Van Schaik & Egenhofer, 2005).³⁷ Much time is devoted to climate change and it is often debated during the lunch of the Council meetings as well as on the sidelines of the many other environmental summits where the Ministers meet. Also, the strong involvement of the Commission's DG Environment contributes to the emphasis on the environmental side of climate change.

Indeed, the European Commission, although it is not the EU's lead negotiator, does have a special role. Its influence is based on its more profound role regarding the Community policies, its permanent position in the troika and its role as official EC representative. Its knowledge of the EU's performance in reducing emissions and policies still planned for is, for instance, essential for the EU's credibility on the international level. In the Council of Ministers the European Commission is seen as an 'extra member state' with expertise, viewpoints and positions on almost all issues on the table, based upon its permanent place in the troika and extensive contacts with other state and non-state actors. Due to these factors the informal role of the Commission, meaning DG Environment, is greater than its formal competence.

³⁵ The official Working Party on International Environment Issues is divided into two working groups: global environmental aspects of sustainable developments and climate change.

³⁶ Within the UNFCCC a yearly Conference of the Parties (COP) is organised. To prepare this COP, the so-called 'meetings of the Subsidiary Bodies' (SBs) take place. Both 'conferences' last for about two weeks.

³⁷ Although decision-making on climate change is not explicitly linked to other issues, there have been occasions when other issues were linked to climate change. In the 2004 trade negotiations with Russia, for instance, the EU appears to have linked Russia's Kyoto ratification to support by the EU for its accession to the WTO.

Recognition

The European Community as such is recognised within the UNFCCC as a Party, which means that the European Commission as its representative has signed the Kyoto Protocol just like the individual EU member states. For most non-EU states, for the NGOs and for the media it is clear that the EU is operating with a single voice in the UNFCCC negotiations and that the Presidency with assistance of the troika is in charge of representing the EC and the EU member states (in their view: the EU).

When it formulates its position, the EU aims to take into account the expected position of other Parties in the negotiations. In reality, the intensive internal EU negotiations have sometimes led to fixed positions embodying a primarily European view. Nevertheless the EU did manage to convince other Parties to go ahead with Kyoto and it is often praised for its leadership in the climate negotiations.

Environmental NGOs, such as Greenpeace and WWF, played an important role in The Hague in 2000, where they urged the EU, and particularly its green Environment Ministers, not to give in to the demands of the US (Carpenter, 2001; Grubb & Yamin, 2001). The breakdown of the negotiations led to a shift in emphasis by the NGOs from more specific issues in the negotiations (e.g. sinks and supplementarity) towards the overall goal of 'saving the Kyoto Protocol'. Business groups in general had less access to the EU's Environment Ministers in comparison to the NGOs and their focus of attention has been heavily geared towards domestic EU climate change policies, such as the CO₂ emissions trading scheme, and less on the EU's stance in the international negotiations. However, where they tried to influence the EU position, they did so with a focus at the EU level and not at the national level.

6. Discussion

In the discussion below, the EU's ability to function both actively and deliberately in the international arena is analysed on the basis of the propositions formulated in section 3.

EU international actorness as coincidence

Our first proposition suggested that the degree of EU international actorness is a function of the extent to which preferences coincide and/or formal rules, legal competences and decision-making procedures have a mediating effect. Our cases illustrate that the coincidence of the initial preferences of member states can provide an explanation for a high degree of EU international actorness; formal institutions seemed to have less effect than one would expect on the basis of this proposition.

The establishment of common positions in both cases reflects the adherence to similar basic goals. Initial differences of opinion on particular provisions of the Statute of the ICC and on the specific commitment of EU member states in terms of greenhouse gas reduction were accommodated. The unanimity requirement for decision-making did not hinder the formulation of common EU positions, nor did it result in lowest-common denominator decisions. In the ICC case, one might, however, argue that the Guiding Principles, by leaving member states the possibility to conclude a bilateral agreement with the US, reflect the outcome of a lowest common denominator decision.

Jupille & Caporaso (1998) only consider full EC authority as an indicator of international actorness. The authority for the external representation of the EU in the two cases studied has been delegated to the Council Presidency. For the ICC, this follows from a CFSP provision in the TEU. For climate change the member states' prerogative to negotiate on their own behalf, in addition to the EC, has led to a situation in which the Presidency represents both the EC and the

EU member states. We therefore propose to extend Jupille and Caporaso's authority to comprise all cases in which EU external representation is delegated to a single European actor on the basis of a Treaty provision or agreement in the Council, and as long as this actor operates on the basis of a commonly agreed EU position.

In our cases, the EU is not operating independently from its member states. Although one might expect on the basis of the formal competences the EU to be less autonomous in the CFSP case (ICC) than in the Community pillar case (Kyoto Protocol), we found no differences in the level of formal autonomy. By contrast, we find differences in the formal recognition of the EU. The EC membership of the UNFCCC gives the EU formal recognition in the climate change case; the EU is not a Party to the ICC, but it could be argued that the negotiation of a formal agreement between the ICC and the EU would grant the EU formal recognition in the ICC case.

Whereas the rational choice institutionalist approach points to how a high degree is possible, it does not tell us much about why we find a high degree of international actorness in our cases. Let us therefore turn to the sociological institutionalist approach to see whether this has additional explanatory power.

EU international actorness as convergence

Our second proposition posed that the degree of EU international actorness is a function of the extent of preference convergence through social interaction processes. We found that the level of preference convergence through social interaction processes can provide an additional explanation for the degree of EU international actorness in the cases we studied.

Our empirical research demonstrates that member states, on the basis of similar basic goals, have developed a common way of realising these goals. In both cases, the group of member state representatives in the Council bodies preparing the EU position (i.e. the Council Working Group on climate change and the sub area on the ICC) remained largely the same over the years. Often having a similar professional background, member state representatives were 'socialised' by the interaction during the frequent meetings taking place in Brussels and the EU coordination meetings at international conferences. Furthermore, US opposition, particularly after the 'unsigned' of the Rome Statute and the US withdrawal from the Kyoto Protocol, drove EU member states together. The EU formulated strong statements and reacted against the US to defend the ICC and uphold the Kyoto Protocol. Paradoxically perhaps, EU member states seemed more willing to formulate common positions and undertake joint actions because of rather than in spite of the US (op)position.

This is not to say that EU member states always stood united, but we do note that differences of opinion occurred relatively early in time. During the negotiations of the Rome Statute, the UK and France initially took different positions than other member states. In the climate change case the image of the EU was damaged by the polemic between the UK and France about a deal negotiated by the UK with the US. The event made clear that not speaking with a single voice negatively affects the ability of the EU to effectively negotiate on the international scene. Ever since, the EU, represented by the Presidency, has been speaking with one voice. Even when member states speak on their own behalf, for instance in the UN Security Council, they have always concurred with the common EU position. We therefore also extend Jupille and Caporaso's notion of authority to comprise all cases in which EU external representation is delegated to a single European actor, as long as this implies that EU member states do not act on their own behalf, but through this EU actor (even though formally they could have acted on their own).

In both cases, we found that the EU was able to acquire a certain level of autonomy from member states through the Commission. In the ICC case, the Commission stretched its

competence by elaborating on the links with issues where it does have a clear competence. A key example is the insertion by the Commission of ICC-related clauses in the revised Cotonou Agreement. The Commission also used several subtle techniques to influence EU policy-making on the ICC of which directly liaising with the ICC, therewith circumventing the Council, is perhaps the most notable. In the climate change negotiations, the role of the Commission is foremost connected to its larger competence with regard to the Community policies in the field of climate change.

Our cases are characterised by a high degree of informal recognition. Interaction with non-state actors and non-EU member states seems to have had a considerable influence on the behaviour of the EU and its member states. Especially in the case of the ICC, NGOs can be said to have acted as so-called norm entrepreneurs (Finnemore & Sikkink, 1998), marketing their view on the appropriate position to adopt by member states. In turn, the EU's policy on the ICC has had a strong impact on third states, which often aligned themselves with the EU position and also adopted the EU guidelines for dealing with US pressure. In the climate change case, the EU is closely followed by other states as well. It can, for instance, rightly be doubted if Japan, Canada and particularly Russia – without US participation – would have continued with the Kyoto Protocol, had the EU not been such a staunch supporter.

7. Conclusion: Towards a framework for explaining EU international actorness?

In both foreign policy areas we studied, contrary to the conventional wisdom regarding the intergovernmental character of EU foreign policy-making, the EU cannot only be seen as an international actor, it can even be considered a leading international actor. The EU and its member states were instrumental in keeping in motion the climate change negotiations and in supporting the establishment of the ICC. Non-EU member states often looked at the EU before determining their positions; nongovernmental organisations tried to influence EU foreign policy-making.

Our analysis of the two cases along the lines of the framework of Jupille & Caporaso (1998) reveals that both the rational choice and sociological institutional approaches have considerable explanatory power for explaining this international actorness to occur. Member states have started to coordinate their foreign policies on the ICC and the Kyoto Protocol on the basis of their initial preferences. Over time, their policies have become increasingly 'Europeanised' through processes of socialisation (Smith, 2004; cf. Stone Sweet et al.). This has resulted in a relatively high degree of EU international actorness, even though the policy-making process is organised in a rather intergovernmental way.

By not only adopting a rational choice institutional perspective, but also by taking a sociological viewpoint, we have made Jupille and Caporaso's framework more explanatory (Jupille & Caporaso, 1998; cf. Jupille et al., 2003). The sociological institutional perspective offers at least three complementary insights into EU international actorness. First of all, whereas rational choice theorists often focus on how institutions constrain and regularise the policy-making process, the sociological institutionalist perspective emphasises the development of institutions over time by looking at the institutionalisation of informal practices and routines. Both our cases demonstrate that the degree of international actorness is not so much dependent on the formal institutional set-up of the policy-making process, but instead upon a common normative orientation of member states towards the policy issue at stake.

Secondly, the sociological institutional perspective points to the added value of looking at social interaction, both with other states and with non-state actors. Particularly the latter turned out to be relevant in our cases. Finally, the sociological line of reasoning may be particularly relevant

for the type of foreign policy areas we dealt with here (i.e. human rights, environment). The EU's international actorness is still primarily based on its strength as a civilian power. It is often noted that the EU in international politics attaches a relatively high importance to moral objectives (Manners, 2002). The rational choice perspective with its focus on (national) preferences and interests is often unable to explain the emergence of international agreements on social, environmental, and human rights issues, i.e. the focus areas of the EU's foreign policy (cf. Smith, 2003). Policies in these areas often have a strong normative character leaving more space for insights drawn from sociological institutionalism.

Hence, although the EU in the ICC and Kyoto Protocol case could be termed an 'intergovernmental actor' in world politics, it is far from evident that international actorness can occur in all areas of external relations that are subject to an intergovernmental set-up of policy-making. Increased understanding about the occurrence of international actorness would require more research on cases in which: a) institutionalisation has not (yet) occurred (such as ad hoc and politicised crises situations); b) cooperation/interaction does not (yet) bring the EU member states together; and c) normative objectives do not (yet) exist to guide the EU's position. Such research could generate additional knowledge on, for instance, the extent to which a basic agreement on initial preferences in an intergovernmental set-up is an essential pre-condition for the EU to act as an international actor or whether certain formal rules, legal competences or decision-making procedures could enhance international actorness in cases where initial preferences diverge.

On the basis of the cases analysed in this article, however, the ongoing debate on institutional reform, with its focus on formal structures and arrangements, seems less relevant for the EU's ability to function actively and deliberately in relation to other actors in the international system than is often portrayed by political reformers. Of course, changes envisaged in the Constitutional Treaty, such as the proposed EU Foreign Minister, the External Action Service and the extension of the European Parliament's powers to vote on the conclusion of international agreements by the EU, could affect the way the EU operates in foreign affairs (cf. Van Schaik & Egenhofer, 2005; Cremona, 2004). But our cases suggest that factors that are more difficult to reform, such as normative agreement between the EU member states on policy objectives, might be just as important or perhaps even more important for the EU's ability to act as a genuine global actor.

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The Future of Europe
 Justice and Home Affairs
 The Wider Europe
 South East Europe
 Caucasus & Black Sea
 EU-Russian/Ukraine Relations
 Mediterranean & Middle East
 CEPS-IISS European Security Forum

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